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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. [redacted] 5

PEOPLE OF THE STATE OF CALIFORNIA,
Appellants,

vs.

UNITED STATES OF AMERICA, EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION,
Respondents.

Jurisdictional Statement

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INTRODUCTORY STATEMENT

This appeal is the business of the Supreme Court. Especially is this so here where a specific mandate of this court is in question. And when it is remembered that in a near decade of litigation it has been this court which first reversed a federal agency and a Court of Appeals of the United States of America[1] and later reversed a Federal District Court,[2] then this new claim of California that error is again being made warrants careful attention. The history of error should perk a curiosity where the proceed-

1. *California v. F.P.C.*, 369 U.S. 482 (1962).
2. *United States v. El Paso*, 376 U.S. 651 (1964).

ings are in the care of the same District Court. This is the lower court which muddled through the trial of the charged violation of Section 7 of the Clayton Act all the while afflicted by a myopia toward monopoly. Perhaps that disability still lingers. There is suggestion of that recurring affliction in the record.

> "Mr. Bennett: * * * But for California, this case would not be here today.
>
> "The Court: That might have been a good thing." *Transcript of Hearing,* October 19, 1964, pages 81 and 82.

The People of the State of California (California) appeal an Order of the United States District Court for the District of Utah, Central Division, Judge Willis W. Ritter, in the case of the *United States of America v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corp.,* Civil No. 143-57. Specifically California appeals from the Order Denying Application of the People of the State of California for Leave to Intervene which Order was filed and entered on January 22, 1965. A previous appeal was taken from the oral denial of the trial judge with reference to California's Application to Intervene. The oral pronouncement was made from the bench on December 8, 1964. By way of protection of the interest of California in this proceeding and inasmuch as the court did not enter its Order Denying Intervention until January 22, 1965, California filed its first Notice of Appeal herein from the oral ruling of December 8, 1964, on January 8, 1965. Such appeal was taken because the trial proceeded, testimony was taken, witnesses entered the proceedings and were discharged, all the while California prevented from participating because of failure of the court to make, to file and to enter its order denying intervention.

The oral ruling effectively barred the participation of California in the proceedings—the trial judge saw to that. And an appeal from an oral ruling being of dubious validity the court proceeded to almost the entire trial of the divestiture proceedings and declined to enter an order which would constitute the basis of appeal.

CITATION TO OPINION BELOW

On January 22, 1965, there was entered in the civil docket of the District Court for the District of Utah, Central Division, an Order Denying Application of the People of California for Leave to Intervene. This Order has not been published in the official reports of the Federal Reporter. A true and correct copy of said Order is attached hereto in its entirety, and marked Appendix "A". A true and correct copy of the Memorandum in Support of said Order Denying Application for Leave to Intervene is attached hereto as Appendix "B".

NATURE OF THE PROCEEDING

The proceeding below and presently pending before the court is a continuation of litigation which commenced on July 22, 1957. These are the divestiture proceedings which followed the opinion of the Supreme Court of the United States in *United States of America v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corp.*, 376 U.S. 651, decided on April 6, 1964. That decision in turn was subsequent to the ruling of this court in *California v. the Federal Power Commission*, 369 U.S. 482 (1962). It has been the insistence of California that this unlawful merger be determined, which resulted in the Supreme Court decisions herein referred to. California is equally insistent that the divestiture proceedings presently before the trial court be conducted and accomplished in a manner which will effec-

tuate the spirit and language of the Supreme Court holdings herein referred to. And, in addition to the particular interest of the State of California in these proceedings which it seeks to protect as a party, California quite frankly wishes to keep this litigation alive so that any possible decree which is not consistent with this court's past directives may be brought to its attention.

It is important to note that in *United States of America v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corp., supra,* this court found that the acquisition of the stock and assets of the Pacific Northwest Pipeline Corp. (Pacific) by the El Paso Natural Gas Company (El Paso) was a violation of Section 7 of the Clayton Act (15 U.S.C.A. Section 18) and remanded the case to the District Court with these instructions:

> "Since appellees have been on notice of the antitrust charge from almost the beginning—indeed before El Paso sought Commission approval of the merger—we not only reverse the judgment below but direct the District Court to order divestiture without delay." (pg. 662)

JURISDICTIONAL STATEMENT

California sought to intervene in the divestiture proceedings below relying upon Rule 24 of the Federal Rules of Civil Procedure. To understand the litigation at this point a brief chronological recitation of some of the events below is necessary to an understanding of this appeal.

The Date of the Judgment Sought to Be Reviewed.

On April 6, 1964, the Supreme Court directed that the divestiture proceed "without delay." Judgment was filed in the district court on May 5, 1964. On July 8, 1964, El Paso was granted 90 days within which to file a plan of divestiture; a plan was filed on October 15, 1964 and set for

hearing on October 19, 1964; the State of California, the appellant herein, filed its Application to Intervention on *July 22, 1964*. On October 19, 1964, the hearing on the proposed plan of divestiture and the Applications to Intervene were continued to December 2, 1964. On November 20, 1964 California filed a Statement in Support of its application to intervene—however, the docket of the proceedings erroneously shows that this statement was filed by the Public Utilities Commission of the State of California, a separate applicant to intervene.

While oral argument was made on the rights of the various applicants to intervene, the proceedings continued on the merits of the plan of divestiture on December 2, 3 and 4, 1964, without any ruling on the various Applications to Intervene.

On December 8, 1964, California filed a request for a ruling on its Application to Intervene or for a stay pending such ruling. On that date the district court orally denied the Application to Intervene and stated:

> "The Court: I will have something to say. All right, gentlemen, the applications for leave to intervene made on behalf * * * of the State of California * * * are denied.
>
> "There will be forthcoming very shortly a short memorandum *and an order which will go into file.*" (Emphasis added.)

The proceedings continued without the denial being entered in the clerk's docket. On December 23, 1964, California filed a motion that the court ex parte enter in the clerk's docket its final determination on the application to intervene. Early in the month of January, 1965, an entry was made on the clerk's docket of proceedings, dated December 2, 1964, denying California's Application to Intervene.

That the record is confusing is clear and the reason for such confusion is inexplicable. The clerk's docket contains an entry dated December 2, 1964 denying California's Application to Intervene when, as the record clearly shows, the judge made an oral pronouncement of denial from the bench on December 8, 1964. In any event the order which is now appealed from was clearly made, filed and entered on January 22, 1965. And upon formal request made months ago to the clerk of the court that the record upon appeal be prepared now at last the record has been completed and California is advised has been filed with the Clerk of the Supreme Court of the United States.

The jurisdiction of this court to hear this appeal rests upon 15 U.S.C.A. 29. Jurisdiction is clearly supported by these authorities: *Sam Fox Publishing Co. v. United States,* 366 U.S. 683 (1961); *Allen Co. v. Cash Register Co.,* 322 U.S. 137 (1944); *United States v. California Cooperative Canneries,* 279 U.S. 553 (1929); *Missouri-Kansas Pipeline Co. v. United States,* 108 F.2d 614 (3d Cir. 1939), cert. den. 309 U.S. 687 (1939).

Jurisdiction to hear is clearly existent because of the mandate. *(U. S. v. El Paso, supra)*

QUESTIONS PRESENTED

1. Whether the Supreme Court of the United States pursuant to its plenary powers of supervision over the federal courts should review the proceedings below to determine whether or not they are being conducted according to law.

2. Whether the specific mandate of the Supreme Court of the United States as enunciated in *United States of America v. El Paso Natural Gas Company,* 376 U.S. 651, wherein the court stated: "We not only reverse the judg-

ment below but direct the district court to order divestiture without delay." is being obeyed.

3. Whether the District Court erred in denying Appellant's application to intervene as a matter or right pursuant to Rule 24(a)(2) and Rule 24(a)(3) of the Federal Rules of Civil Procedure.

4. Whether the District Court abused its discretion in denying Appellant's application to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

THE INTEREST OF CALIFORNIA IN THE DIVESTITURE PROCEEDINGS

This court is asked to notice from its previous opinions, *California v. Federal Power Commission,* 369 U.S. 482 (1962), and *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964) the great and growing gas market of California and the dependence of California upon imported natural gas as an energy source. For example in *United States v. El Paso Natural Gas Company, supra* this court noted "the vastness" of the California markets and its "booming incremental needs" for such gas (page 660).

California is interested in participating in the divestiture proceedings so as to insure that the successor New Company to Pacific Northwest will be a viable competitive corporation seeking to compete for the growing California market. Neither California nor this court, can sit by while the District Court entertains only such plans the effect of which fail to comply with the mandate of the Supreme Court. California's concern is aggravated by the course of the divestiture proceedings wherein the lower court has severely restricted the presentation by the government and has, in effect, made the government's representation less than adequate.

PROPOSED PLANS OF DIVESTITURE

The plan which is occupying the great time of the trial court is deficient as measured against the mandate "without delay." Basically El Paso's plan of divestiture is to form a new corporation (New Company) and to transfer (spinoff) assets of Pacific Northwest to New Company. Fatally, however, the plan proposes a redistribution of capital shares of New Company from the El Paso Natural Gas Company, a corporation, to the present individual shareholders of the El Paso Natural Gas Company. The El Paso shareholders are to receive an identically substantial proportion of shares of the New Company as they own in El Paso. In substance the corporation removes its equity holdings from the corporate treasury and places it in the individual ownership of its own shareholders. This is not divestiture as this court has previously held.

The plan of El Paso proposes a chief executive and trustee of the New Company but unfortunately neither his name, background or qualifications have been subjected to even the most gentle testing in the public court.

There are other features of the divestiture plan which are equally objectionable but the fatal failure to give up ownership is the most marked of its deficiencies.

The scheme to distribute the shares of the New Company to individual El Paso shareholders is contrary to *United States v. Union Pacific Railroad Company,* 226 U.S. 470 (1912) wherein the court holds: "We are of the opinion, however, that the proposed plan of disposition of the entire stockholding of the Union Pacific Company in the Southern Pacific Company by transfer to the stockholders of the Union Pacific Company will not so effectively end the combination as to comply with the decree heretofore ordered by this court to be entered." (Page 477).

The total record must be viewed to grasp the atmosphere in which the divestiture proceedings are being conducted. Perhaps the clearest exposition of the erroneous application of the monopoly laws to the natural gas industry is found in this dialogue from the transcript of proceedings, December 10, 1964, at page 630:

> "The Court: You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area to El Paso. That's what the root of this plan is.
>
> "Now, if you're going to get New Company down here in competition in Southern California from the San Juan Basin, you'd upset the whole scheme. To even that situation up, you're going to have to put El Paso up in the Northwest in competition there; and that's a kind of ridiculous thing—long pipelines from these various sources.
>
> "It seems to me to make a lot of sense that New Company operating in the Northwest from very much closer Canadian reserves, and Northwest reserves, and El Paso down in the Southwest, with reserves in the San Juan Basin, serving the Southern California area, among some other areas. That seems to me to make a lot of sense.
>
> "Now, to be talking rather academically and conjecturily making surmises about what's going to happen in the 70's and 80's and so on, that doesn't help me out very much in the problem I have to solve here."

When the latest proposed plan becomes a part of the record herein, California will present it to this court. California wishes to make it plain that it does not criticize negotiations and conferences as such nor does it object to the exploration of suitable decrees. It does, however, strongly criticize the time which such negotiations and

conferences are taking and the apparent failure to arrive at any plan which complies with the mandate of the Supreme Court.

THE LATEST PLAN OF DIVESTITURE

The record below is devoted to one particular plan and has been strongly criticized by the government which has asked the court to reject such proposal. The court, however, neither rejects or accepts. In the meantime another plan has become the subject of negotiation. This plan has apparently been presented to the district court but whether it is to be subject to public hearing is not known. The records of the trial court do not indicate that any proceedings have been held in connection with a new plan or that any are about to be held. California has discussed this plan with the government and has pointed out that it is deficient in complying with the mandate of the court.

The latest plan creates a New Company, a chief executive officer and voting trustee at the same time, and then permits or directs—it is not clear—a stock exchange within eighteen months after the transfer of assets to New Company or if the stock exchange be not successful then El Paso is directed to sell all shares of stock in New Company within eighteen months. But the over-riding time provision provides that all of this shall be done "within three years . . ." What we have here then is a period of eighteen months for a stock exchange to be accomplished and if that fails an additional eighteen months—or three years to sell off the equity in the new corporation. California takes the position that because of the unnecessarily long period of time to accomplish either an exchange or a sale when measured against the time which has already elapsed and the possibility if not probability of a present outright sale to

independent third parties that this period suffers fatally because it is not "without delay." And either the exchange plan or the sale of stock begins only "after the transfer of assets"—whenever that is!

THE QUESTIONS ARE SUBSTANTIAL

A. Appellant Is Entitled to Intervene as a Matter of Right.

The applicable provisions of Rule 24(a) are as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

1. Timeliness of Application for Leave to Intervene.

Appellant applied to intervene in the divestiture proceedings on July 22, 1964, shortly after this Court's mandate ordering divestiture was returned to the District Court on May 5, 1964. Clearly, the divestiture proceeding constituted a new matter before the District Court, involving issues separate and distinct from the issues of antitrust violation involved in the original action. Appellant's Application to Intervene preceded El Paso's submission of its proposed plan of divestiture by nearly three months. Consequently it is clear that Appellant's Application to Intervene did not interfere with the orderly disposition of the divestiture proceedings, and was not aimed at reopening any issues previously litigated or presented before the District Court.

It is well-settled that, while timeliness of an Application to Intervene is to be determined from all the circumstances shown, the most important factor is whether the delay in moving for intervention would prejudice the rights of existing parties to the case. (*Kozak v. Wells,* 278 F.2d 104, 109 (8th Cir. 1960); 2 Barron and Holtzoff, Federal Practice and Procedure, sec. 594, at p. 366). Since Appellant has sought intervention for the sole purpose of insuring that its interests, and the interests of its citizens, are protected by the immediate establishment of an effective plan of divestiture, and not to reopen any of the antitrust issues, its application for intervention cannot have prejudiced, and will not prejudice, the rights of existing parties to the divestiture proceedings.

Numerous cases hold that an Application for Intervention is timely even though made after final judgment was entered on the merits. As stated in *Wolpe v. Poretsky,* 144 F.2d 505, 508 (D.C. Cir. 1944):

> "The application to intervene was timely. Intervention may be allowed after a final decree where it is necessary to preserve some right which cannot otherwise be protected. *Here at least one of the rights which cannot be protected without intervention is the right of appeal.* The court was, therefore, in error in denying appellants leave to intervene as a matter of right." (Emphasis added.)

Accord: *Cuthill v. Ortman-Miller Machine Company,* 216 F.2d 336, 338 (7th Cir. 1954); *Pellegrino v. Nesbit,* 203 F. 2d 463, 465-466 (9th Cir. 1953), and cases cited therein.

In the above cases, the application to intervene was made *after* a final decree had been entered. Appellant's position is even stronger, since its application was made before any plan of divestiture had even been considered.

THE REPRESENTATION OF CALIFORNIA'S INTEREST IS INADEQUATE

A review of the record will disclose the inadequacy of the representation by the United States Attorney of the interests of California. The District Court has permitted the United States Attorney no opportunity to be adequate. It is apparent that the District Court is unhappy with the reversal by this Court,[3] refuses to accept the findings made by this Court,[4] forecloses pertinent cross-examination,[5] makes the production of essential evidence impossible;[6]

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3. See argument of the State of California on its application to intervene, *Transcript of Hearing*, October 19, 1964, pages 81 and 82:

"Mr. Bennett: • • • But for California, this case would not be here today."

"The Court: That might have been a good thing."

4. This Court stated in *U. S. A. v. El Paso Natural Gas Co., et al* (*supra*) on Page 3:

"Pacific Northwest was no feeble, failing company, nor was it inexperienced and lacking in resourcefulness. It was one of the two major interstate pipelines serving the trans-Rocky Mountain states. It raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant it was viewed with concern and coveted by El Paso."

Compare this finding with the statement of District Court, *Transcript of Proceedings*, December 3, 1964, on Page 205,

"The Court: • • • As a matter of fact, it's the record of these cases that Pacific Northwest was about to fold. They were in very dire financial status. That's the record in this case. • • •".

Compare it also with *Transcript of Proceedings*, December 10, 1964, on page 630.

5. See the limited cross-examination of Mr. Kayser, presenting El Paso's proposed plan of divestiture: *Transcript of Proceedings*, December 2, 1964, on pages 92 and 99.

6. In the argument for intervention by the State of Oregon, *Transcript of Hearing*, October 19, 1964, Page 108

"Mr. Sabin: On behalf of the state of Oregon, I would strenuously object to deferring intervention up to the moment

refuses to permit the United States to confer with California's representative,[7] and summarily excludes consideration of any alternate forms of divestiture proposed by the United States because the District Court is giving primary concern to the interests of the stockholders of El Paso. The objections of the United States Attorney to the proposed plan of divestiture are ignored. In spite of the repeated attempts of the United States Attorney to advise the District Court that it has embarked upon a "wild-goose-chase",

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of trial. As Mr. Bennett points out, witnesses are expensive. While we have some on our payroll, some we will have to hire. We don't want to spend that sort of money if the intervention is going to be denied.

"The Court: Well, I suspect the state of Oregon is going to be able to pay for the witnesses down here.

"Mr. Sabin: I might add, your Honor, that we are in budgetary trouble all the time in our office."

The nature of the evidence sought to be adduced is brought out in *Transcript of Proceedings*, December 2, 1964, page 10:

"Sabin: • • • Our preliminary estimates, which are people are willing to do on record at this point, indicate an over estimation in this San Juan area reserves in the New Company of 85%, approximately."

In this regard, consider the attempt of the U. S. Attorney to produce this evidence from a witness who had little time to acquaint himself with the complexities involved. See testimony of Ray B. Riggs, Jr., *Transcript of Proceedings*, December 8, 1964, pages 361-365; December 10, 1964, pages 508-578.

7. *Transcript of Proceedings*, December 3, 1964, Page 165.

"The Court: Now, Mr. Bennett, I wish you would not interrupt by conversing with the United States Attorney and conversing with government counsel. Why are you sitting at the table with government counsel, anyway?

Mr. Bennett: Well, your Honor, if you object, and I gather that you do . . .

The Court: I don't object to it, but you bother me when you are carrying on these conversations when I am trying to listen to what counsel is saying.

Mr. Bennett: For that I offer my apologies to the Court and won't do it again. If you wish me to remove myself from this seat, I'll be happy to do so.

The Court: Why don't you do it? And we don't have that trouble again."

he is repeatedly told to continue along a predetermined line of inquiry[8] that, in the light of the prior decisions of this Court, can only result in a prolonged consumption of time, a fruitless conclusion, and the frustration of the mandate of this Court that the divestiture be made without delay.

If the District Court had permitted the United States Attorney to assume his proper role rather than the secondary role he was permitted of "being seen but not heard" by the District Court, it is recognized that he is best qualified to assure that complete and efficacious effect is given to the prohibitions of § 7; however this Court has stated that the secondary issue for consideration in this phase of a divestiture proceedings is to see that it is accomplished with as little injury as possible to the general public. Because of the injection of this secondary issue in this phase of these proceedings, the interests of the general public are concerned; and California, representing the state with the greatest population and the unexcelled market for natural gas in these United States, should be represented.

California Is Both Prejudiced and Bound by These Proceedings.

California is the real party of interest in these proceedings. Because the California rate-payers have paid the additional costs of non-competitive gas, California, in their interest, has been an initiating influence in this cause, actively participating in this litigation since 1957. Its vital interest caused it to appear as intervenor and petitioner

8. See: *Transcript of Proceedings*, December 2, 1964, page 95, line 8; page 96, line 18; page 98, lines 8-20; December 3, 1964, page 219, lines 4-6; page 243, lines 8-24; December 4, 1964, page 280, lines 7-23; page 351, lines 10-15; December 8, 1964, page 385, line 23; page 394, line 7; page 394, lines 22-25; page 404, lines 1-16; page 417, lines 8-15; December 9, 1964, pages 500-501.

in the earlier, collateral case, *California v. Federal Power Commission,* 369 U.S. 482 (1962). It appeared as amicus curiae in this case prior to this Court's remanding decision with which we are now concerned.

It is the position of California that a proper divestiture requires that the prior competitive capacity of Pacific Northwest be restored to an independent entity. But this Court knows that this cannot be achieved by the action of the District Court alone. After establishing the new entity, only the Federal Power Commission can give it operating authority. The District Court cannot properly encompass the broad public interest involved in this divestiture by ignoring the impact of its disposition of assets at this second proceeding.

California will be an intervenor in that second proceeding to protect the interest of the general public of the State of California. However, the Federal Power Commission will be bound by the District Court's disposition of the property subject to its control—the assets, financial structure, and contractual obligations of New Company will have been predetermined by the District Court. Should the proceedings be permitted to continue along the route they are now directed, separate entities competing for the California market cannot arise.

THE RIGHT TO INTERVENE AS PARENS PATRIAE

A State has an absolute right to intervene in litigation to protect the interests of its citizens, even though it fails to meet the technical requirements of Rule 24. This principle was recognized in *People of the State of California v. United States,* 180 F.2d 596 (9th Cir. 1950), wherein the court held that the State of California had the right to intervene in a dispute involving water rights, not only in its proprietary

capacity as owner of the water, but also as parens patriae, representing the interests of its people:

> "The contention of the United States that the State of California cannot intervene as a matter of right must be rejected. The State of California is entitled to intervene as of right on each of the claimed grounds, not only in its proprietary capacity as asserted absolute owner of the water in suit, but also in its capacity as parens patriae." (180 F.2d at p. 600)

The court cited and discussed numerous authorities to the effect that lack of a direct pecuniary interest in the controversy would not defeat the State's right to protect the interests of its citizens with respect to the sale and use of natural resources.

Similarly, in *Mitchell v. Singstad,* 23 F.R.D. 62 (D. Md. 1959), the court upheld the right of the Maryland State Roads Commission to intervene in a labor dispute, holding as follows:

> "Grounds for intervention under a literal interpretation of Rule 24(a) or (b), F.R. Civ.P., 28 U.S.C.A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as parens patriae or other grounds. [citations]. Intervention by private groups has been permitted in unusual cases where the public interest was sufficiently imperative. Admittedly there is a strong authority to the contrary, but the decision in each case must be made on its own merits, in the light of the dominant purpose of the Federal Rules of Civil Procedure—to secure the just determination of every action. Rule 1." (23 F.R.D. at p. 64).

If a state may intervene to protect its interest in a water suit; if a state may intervene in a labor dispute; then the great impact of divestiture proceedings upon a state would clearly confer the right to participate.

The District Court Abused Its Discretion in Refusing Intervention.

Rule 24(b)(2) permits intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."

In the present situation, California's interest in securing a plan which complies with the mandate of this Court, is identical to the questions of law and fact presented to the District Court in the main action. In view of the magnitude of the interests which California represents, and in view of the far-reaching effect which any plan of divestiture will have upon its citizens, the District Court clearly abused its discretion in refusing intervention.

This Court, in *Securities Commission v. U. S. Realty Co.*, 310 U.S. 434 (1940), held that the District Court properly allowed the S.E.C. to intervene in a bankruptcy proceeding, pursuant to Rule 24(b)(2). This Court concluded in the following language fully applicable to the instant case:

> "[W]e think it plain that the Commission has a sufficient interest in the maintenance of its statutory authority and the performance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it. (citations)" (310 U.S. at 460)

The Authority of the Supreme Court to Police Its Mandate Is Clear.

The proceedings before the trial court are merely an implementation of the mandate set forth in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, wherein the court quite clearly directed that divestiture be accomplished with expedition.

As early as *Continental Ins. Co. v. United States*, 259 U.S. 156 (1921), the Supreme Court enunciated an encompassing jurisdiction over its mandates and particularly in a divesti-

ture proceeding. The Continental case was an appeal from an attempt to dissolve an unlawful combination and there on Page 165 the court said:

> "Ordinarily the scope of our review of the decree of the District Court would be limited to the assignments of error of the appellants, but in this case, as the decree which is before us was entered under a mandate of this court, we have jurisdiction to consider on our own motion whether our mandate has been complied with. We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion."

This principle was reaffirmed as recently as *United States v. DuPont & Co.*, 366 U.S. 316, 325 (1961), wherein this court stated:

> "First of all, the (divestiture) decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out."

THE CONDITIONS WHICH EVOKE THIS COURT'S POWER

The Time Involved.

In this extensive litigation, California has pointed out that the charged violation of Section 7 of the Clayton Act was known to El Paso and Pacific Northwest as far back as 1956. The Supreme Court in *United States v. El Paso Natural Gas Co.* (*Supra*) pointed warnings to El Paso and Pacific Northwest of the consequences of pursuing an unlawful merger saying: "Since appellees have been on notice

of the antitrust charge from almost the beginning . . ." (662). The beginning was even before the date of the filing of the complaint in Utah (July 22, 1957); it was at least as far back as December 31, 1956, when the Securities & Exchange Commission inquired of El Paso as to possible violations of the antitrust laws because of the stock acquisition of Pacific Northwest. This unlawful combination has been flourishing and known in its possible unlawful consequences to El Paso since 1956. In short after almost 9 years, two Supreme Court decisions, and a subsequent divestiture proceeding which is unresolved, Section 7 of the Clayton Act is still being violated. Only now it is being less offensively violated somehow simply because a vehicle styled "Divestiture Proceeding" is running on endlessly—and no decree issues!

THE OBVIOUS RELIEF

El Paso's plan or plans for divestiture whether they be that which was the subject of the divestiture proceedings or some later negotiated decree are at this point afflicted with a disability as to timeliness. When there is added to the 9 years of past unlawfulness the years required under either plan of divestiture to sever completely El Paso and Pacific, then it can be seen that such plans can only be described as containing more delay.

In addition to the defect coming from want of expedition, the plan or plans of El Paso are poor substitute for an outright separation of the two corporations.

The Alternatives to El Paso's Plans.

In that document entitled "Plaintiff's Brief After Divestiture Proceedings" filed by the Department of Justice in the trial court is set forth the objective of the divestiture hearings. In the words of the government, it seeks to

reconstruct Pacific Northwest ". . . as a viable pipeline able to serve its markets and able to expand to serve other markets. We seek to reestablish this company in such a way as to enable it to offer competition to El Paso for the California market and elsewhere. . . . (Transcript 66). In order to accomplish this result we believe that the New Company should be created to stand free from any connection with El Paso. . . ."

At Page 11 of the government's brief are discussed available alternative divestiture plans proposed by the government. And here the government points out that it has produced representatives of three separate groups, each of whom voices a willness to purchase the new company and to operate it in competition with El Paso (Transcript 738-96). None of these prospective buyers is associated with El Paso (Transcript 751-52, 783-785-790). El Paso unfortunately *has declined to negotiate* with any of these prospective purchasers and yet as the government says "There is no question but that these persons represent able and willing buyers each of whom is competent to operate the pipeline company divested (Transcript 776). El Paso has stipulated on the records that these persons are financially responsible and are able to manage the pipeline (Transcript 742, 749-50, 758, 777-78, 779-87, 790-91, 793-96, GX23).

The government concludes then "Thus, sale to a third party is both a desirable and feasible alternative to the El Paso plan". (Pg. 12, Government Brief.)

Placing this case in perspective then, we have here a defendant corporation, El Paso, which has been in violation of the Clayton Act and on notice thereof since 1956. It has been the subject of two opinions by the Supreme Court of the United States and it is under a clear injunction to divest

itself of Pacific Northwest. Now El Paso is presented with at least three willing, independent and competent purchasers—competent in terms of financial responsibility and operating ability. The United States government gives each of them high marks. Indeed not only are they recommended by the government but as the government points out, one of them has proposed a plan which would result in a tax saving to El Paso of 24.5 million dollars. (Transcript 792).

And yet El Paso will not even enter into discussions with any of these prospective purchasers!

With these facts clearly in mind it is then quite wrong that El Paso, the monopolist, should seek to impose the conditions of divestiture. The objective of the Supreme Court was quite clear—divest immediately so as to insure prompt compliance with the Clayton Act! If there were no alternatives available some delay would be understandable, But in the face of reasonable alternatives then the stalling techniques of the trial court and the arbitrary refusal of El Paso to comply except upon its own favorable terms is inexcusable.

Outright Sale Against Exchange or Ultimate Spin-off.

The Supreme Court should take over this matter and promptly. California filed an Application for a Stay which was denied without hearing and without opinion. That application was filed on February 17, 1965 and it was done with the certain knowledge on the part of California that these proceedings were far from terminated.

It is apparent that the proceedings below have become a game in which the government is asked to bend in its view. Negotiations toward unacceptable compromises between the parties are strongly suggested by the trial judge. And in the meantime El Paso marshalls its resources throughout

the West seeking to remove California's voice from these proceedings[9] and it busies itself entering into new projects and contracts to be imposed ultimately upon New Company. So far as California is concerned further protracted litigation as the price to insure compliance with the orders of this court is quite acceptable. This court must grasp that El Paso is willing to divest only upon terms completely favorable to itself. It is unwilling apparently to suffer the slightest inconvenience, hardship or discomfort simply because it violated the Clayton Act. El Paso places tax considerations and other financial matters in high priority over compliance with the Clayton Act.

This result is not what the Congress intended when it enacted the monopoly laws and strengthened them by Section 7 of the Clayton Act; nor is it what this court should permit with reference to one of its mandates. Time has a quiet way of passing and even though measured by single days the accumulation of single days herein has amounted to a substantial time already. Further there is not the slightest doubt but that a trial judge bent upon achieving compliance "without delay", could not have reached that end by now.

OUTRIGHT SALE IS EASILY ACCOMPLISHED

El Paso is confronted with ridding itself of a pipeline. Pacific Northwest has an operating history and a period of earnings behind it.

This is an actual operating pipeline whose bright future was spoken to in *United States v. El Paso Natural Gas*

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9. See Reply of Respondent El Paso Natural Gas Company to the Application of William M. Bennett as Special Counsel in the Stay of Proceedings in the United States District Court for the District of Utah, Central Division, filed in the Supreme Court of the United States on February 26, 1965 herein.

Company, supra, as "Though young, it was prospering and appeared strong enough to warrant a 'treaty' with El Paso that protected El Paso's California markets.", Page 659; and again at Page 661, "Pacific Northwest had proximity to the California market—. . . it had enormous reserves . . . had Pacific Northwest remained independent, there can be no doubt it would have sought to exploit its formidable geographical position vis-a-vis California"; and "Pacific Northwest was no feeble, failing company; nor was it inexperienced and lacking in resourcefulness. . . . it had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern and coveted by El Paso." (P. 661)

Millions of dollars of securities in newly formed pipeline corporations have been readily sold even before operations commenced. And so any self-created difficulties as to selling this corporation outright are less than real.

Further the financial community of America is available for advice and counsel.

THE CONTINUED DOMINATION

Absent an outright sale to a third independent group, Pacific Northwest or New Company is placed on a shelf of inactivity. It is not realistic to expect aggressiveness of management or the dreaming and doing of daring plans by a chief executive officer who awaits the events which will one day make his ultimate shareholders.

THE IMPORTANCE OF EXPEDITION

Relief from monopoly is never achieved until the relief ordered is accomplished. A mere statement of condemnation lacking implementation is meaningless. Thus as this Court well knows a critical phase of any antitrust proceeding rests

in divestiture. The pronouncement of a broad protective public principle against monopoly is sham unless the condemned monopoly be in fact set aside. And most importantly not only must such unlawful business combination be destroyed but if the national policy against monopolies is to be effective then such destruction must be reasonably imminent. And in a case wherein this court has left no doubt that it wishes the unlawful arrangement to end "without delay" then there clearly comes a time and particularly under the particular facts of this case when the prohibition against delay is dishonored. Any plan or proposal which permits for even one additional day where unnecessary a perpetuation of this unlawful monopoly thus fails to comply with the mandate of the Supreme Court. And in all of its grave consequences it means that the violation of Section 7 of the Clayton Act which was clearly spoken to in the litigation herein is no more than that beautiful principle against monopoly enunciated—but in practice condoned and continued. That is this case! And the proposals to the district court and the decrees presented do no more than put off to some vague future date the divestiture which this court called for promptly. While it is hazardous to predict an ultimate decision from the lower court, it seems reasonably accurate to forecast that no action will be taken below until the government modifies its stand of opposition to El Paso. This may take a considerable period of time and, of course, while recognizing that there are methods to compel decisions, nonetheless they themselves are time consuming. The result is that everybody just waits — including the Supreme Court of the United States. And until the bizarre views of the trial judge as to monopoly and cartels are adopted, apparently we shall wait endlessly.

CONCLUSION

The questions California raises are substantial and of public importance. Proper jurisdiction should be noted.

The Supreme Court of the United States should now take up the divestiture proceedings for complete scrutiny to satisfy itself that its decision and mandate herein are being respected.

Respectfully submitted,

WILLIAM M. BENNETT*
Special Counsel for the People of the State of California

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*(Still Special Counsel)

(Appendices Follow)

Appendix A

In the United States District Court
For the District of Utah, Central Division

Civil No. 143-57

United States of America,
Plaintiff,

vs.

El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation,
Defendants.

ORDER DENYING APPLICATION OF THE PEOPLE OF THE STATE OF CALIFORNIA FOR LEAVE TO INTERVENE.

This action came on for hearing in this Court in order to frame a decree of divestitute pursuant to *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964).

On October 19, 1964, the application pursuant to Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure of the People of the State of California, appearing by Special Counsel, for leave to intervene in the above-entitled action came on for hearing;

This Court at that time fixed November 19, 1964, as the date on or before which said applicant should file with this Court its written statement of evidence, law, and argument in support of said application;

This Court at that time fixed December 2, 1964, as the date upon which it would receive all evidence and hear oral argument in support of said application;

On December 2, 1964, this Court heard oral argument on said application;

No evidence in the form of witnesses or documents in support of the interest of said applicant in the above-entitled matter was ever offered by said applicant;

On December 8, 1964, this Court made its oral order denying said application and thereafter offered to this applicant the opportunity to present orally or by written memorandum to this Court at any time any matters this applicant deemed to be of assistance to this Court in determining the issues before it in this action.

Accordingly, IT IS ORDERED that said application for leave to intervene on the basis of said Rule 24(A)(2) and (A)(3) and Rule 24(B)(2) of the Federal Rules of Civil Procedure be and the same hereby is, DENIED.

WLLIS W. RITTER
WILLIS W. RITTER

Chief United States District Judge.

Dated: Jan. 22, 1965.

Appendix B

In the United States District Court
For the District of Utah, Central Division

Civil No. 143-57

United States of America,
Plaintiff,

vs.

El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation,
Defendants.

MEMORANDUM OPINION OF THE COURT DENYING APPLICATIONS, MOTIONS AND PETITIONS TO INTERVENE OR TO APPEAR AS AMICUS CURIAE

After hearing in this court in a proceeding to frame a decree of divestiture pursuant to *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964), a consideration of the oral arguments, files and records, and the various "motions", "applications" and "petitions", it is

ORDERED that the motions, applications and petitions be and they hereby are DENIED upon the grounds and for the reasons set forth in the memorandum of defendant El Paso Natural Gas Company filed November 25, 1964, which the Court hereby adopts as his Memorandum Opinion.

"There are now twenty strangers to this litigation seeking to become parties by "motions" and "applications" to intervene. Their claims to the rights of parties, including the right to appeal from a final divestiture decree, come long after the trial and entry of the judgment, which was reversed by the Supreme Court upon an opinion requiring

"divestiture without delay". Every issue on the merits between plaintiff and El Paso has been finally adjudicated. All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court.

Intervention is opposed by both El Paso and the United States (Tr. 79, 109).[1]

The score of applicants and movants for intervention consist of the public utilities commissions of seven states,[2] the State of California (as distinguished from its public utilities commission), eleven natural gas distributing companies,[3] and Paradox Production Corporation, whose claim rests upon the astonishing assertion that it is entitled to intervene because it wishes to purchase the assets of which El Paso is to be divested.

The positions of these movants and applicants are in hopeless conflict; they reflect disputes among the would-be intervenors *inter se* respecting their conception of what will serve the "convenience and necessity" of the natural gas consumers they have undertaken to represent. The anti-trust questions before the Court are paramount to such matters.

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1. "Tr. ....." refers to the transcript of the hearing held on October 19, 1964, at which the would-be intervenors in attendance were allowed until November 19, 1964, to file briefs in support of their motions and applications to intervene, which were then continued for hearing to December 2, 1964.

Underscoring quoted matter has been supplied, except where otherwise indicated.

2. California, Idaho, Nevada, Oregon, Utah, Washington and Wyoming.

3. Cascade Natural Gas Corporation, Intermountain Gas Company, Mountain Fuel Supply Company, Northwest Natural Gas Company, Pacific Gas and Electric Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Utah Gas Service Company, Washington Natural Gas Company and Washington Water Power Company.

The Utah and Wyoming Public Service Commissions, and seven distributing companies,[4] support El Paso's plans for divestiture. They ask to intervene only if the motion of another is granted.

The regulatory commissions of California, Idaho and Nevada, and Mountain Fuel Supply Company and Washington Water Power Company, confine themselves to claims of a right to represent consumers in their states and have taken no position on El Paso's plan. The Nevada commission would intervene only if the application or motion of another is granted.

Dissatisfaction with various details of El Paso's divestiture plan is alleged by the Oregon and Washington commissions, the State of California (as distinguished from its public utilities commission) and Cascade Natural Gas Company. Of course, Paradox Production opposes El Paso's plan because the plan does not contemplate a sale of assets to Paradox.

Pacific Gas and Electric Company appears to contend simply that this Court has no jurisdiction over the details of the divestiture ordered by the Supreme Court.

II.

NO ONE IS ENTITLED TO INTERVENE AS OF RIGHT

In this Court the requirements of Rule 24 govern intervention. The Rule requires that an applicant be permitted to intervene only upon a "timely application" showing that:

(1) a statute of the United States confers an unconditional right to intervene,

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4. Intermountain Gas Company, Northwest Natural Gas Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Washington Natural Gas Company and Utah Gas Service Company.

(2) the representation of the applicant's "interest" by the existing parties is or may be inadequate *and* the applicant is or may be bound by the judgment, or

(3) the applicant will be adversely affected by disposition of property subject to the control of the Court.

A. None of the Applications or Motions Is "Timely".

Rule 24 requires expressly that an application to intervene be "timely". The fact that each of the motions and applications before the Court was filed long after judgment was entered is itself a sufficient basis for denial.

Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp., 24 F.R.D. 476 (W.D. Pa. 1959), was a movie antitrust case in which would-be intervenors filed their applications after an appeal from the judgment had been dismissed in the course of settlement. The Court held (p. 477):

> "Where there is substantial litigation, tardy intervention will usually be denied. Intervention after judgment is unusual and not often granted. See Vol. 4, Moore's Federal Practice, § 24.13. . . .
>
> ". . . as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have, in effect, slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania."

Intervention was denied.

B. No Movant or Applicant Has Shown the "Interest" Required for Intervention.

Rule 24 requires that a would-be intervenor demonstrate at the outset an "interest" in the subject of the action. The commission and distributor movants and applicants

allege the same general "interests", except for Paradox Production Corporation which has none at all (*infra*, p. 18).

The state regulatory commissions each allege an "interest" in asserting the conflicting claims of gas consumers in their states regarding the New Company to be created by divestiture. The distributing companies also volunteer to protect the "interests" of their consumer customers and, of course, their own economic well being.

Such matters cannot prevail over *antitrust* requirements in this case. The Federal Power Commission held that the merger of Pacific Northwest into El Paso was supported by regulatory considerations of public convenience and necessity. The Supreme Court did not disagree, but held, instead, in *California v. Federal Power Commission*, 369 U.S. 482 (1961), that such considerations give way to paramount antitrust policies under Section 7 of the Clayton Act. The approving regulatory determination of the Commission was therefore laid aside by the Supreme Court in order that the controlling *antitrust* questions might be determined.

Compliance by this Court with the mandate of the Supreme Court for "divestiture without delay" should not be defeated by intrusion of collateral disputes between intervenors over questions irrelevant to the controlling requirements of the antitrust law.

This principle finds expression in an unbroken line of authorities. *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 315 F2d 564 (7 Cir. 1963), *cert. den.* 375 U.S. 834, was an antitrust damage suit brought by Illinois public utilities companies against manufacturers of utility electrical equipment. Plaintiffs alleged that the defendants conspired to fix prices, allocate markets and the like, so that plaintiffs were overcharged for electrical equipment they purchased from defendants. The Attorney General of

Illinois sought to intervene "in order to represent and protect the interests of the public consumers . . . who . . . were injured by defendants' price fixing conspiracies" (p. 566). Intervention was denied:

> "We hold that the State of Illinois as agent or parens patriae of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.
>
> The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The after effects of the hurt on the consumers are consequential and too remote for the consumers to gain rights against the conspirators.
>
> The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate cause of their injury, not the antitrust violation. See Keogh v. C. & N. W. Ry. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). *The consumers' rights do not penetrate through to the antitrust conspiracies.*"

This is well supported by Supreme Court authorities.

Pipeline Co. v. United States, 312 U.S. 502 (1941), was an action by the government to enjoin activities by defend-

ant utilities alleged to have eliminated Panhandle Eastern Pipeline Company from competing for the Detroit market. A consent decree had been entered. It expressly permitted Panhandle Eastern to become a party to enforce specified rights given it by the decree. Upon reopening to modify the consent decree, Panhandle Eastern was held entitled to intervene under these decree provisions but not to have a sufficient interest to intervene under Rule 24.

In *Allen Co. v. Cash Register Co.*, 322 U.S. 137 (1944), National Cash Register Co. had earlier been enjoined from acquiring a competitor without approval of the Court. It petitioned for Court permission to acquire Allen Co. The government opposed and Allen itself sought to intervene. The intervention application was held properly denied because Allen would not be bound by the decision of National Cash Register's petition and had no interest in the distribution or disposition of property in the Court's custody within the meaning of Rule 24. *Pipeline Co. v. United States* was distinguished as turning upon decree provisions entitling Panhandle Eastern to become a party.

Sutphen Estates v. United States, 342 U.S. 19 (1951), an offshoot of *United States v. Paramount Pictures*, 334 U.S. 131 (1948), is in point. After the Supreme Court decided the *Paramount* case, defendant Warner Brothers was ordered "reorganized" into two companies in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. The lessor sought to intervene to protect its rights against Warner as guarantor. It was held to have no right to do so because the lessor was not "a privy of Warner" and the "reorganization" decree would not bind the lessor in any legal sense. The Supreme Court recognized, however, that lessor had an interest in property

subject to Court disposition within Rule 24 (a) (3). It rejected this "interest" as a basis for interference with *antitrust* relief by way of intervention in this language, which disposes of the motions and applications now before the Court (p. 22):

> "We do not think, however, that on this record appellant has shown that it will be 'adversely affected' by the reorganization within the meaning of Rule 24 (a) (3). . . . We hold only that appellant has not maintained the burden of showing that under Rule 24 (a) (3) it may intervene as of right."

The well-settled rule that paramount antitrust considerations cannot be defeated through intrusion of "interests" resting upon other grounds was sustained in *Fox Publishing Co. v. United States,* 366 U.S. 683 (1961). The United States sued ASCAP to restrain practices allegedly injurious to competition for the artistic works of ASCAP members. After entry of a consent decree, certain publisher members of ASCAP sought to intervene in modification proceedings. The Court held they had no interest within Rule 24 (p. 689):

> "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."

The Court buttressed this conclusion with a warning that intervention ought not "to subvert":

> ". . . the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the government . . ." (p. 693).

See also the opinions in *United States v. duPont & Co.*, reported at 13 F.R.D. 487 (N.D. Ill. 1953) and 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962), both denying stockholders' petitions to intervene brought at various stages of the case.

These authorities dispose of the contention that the applicants and movants here have an "interest" within Rule 24 entitling them to intervene and the related assertion that they would be "bound" by the final divestiture decree in the legal sense required by the Rule. We turn to the claim that the public interests the would-be intervenors have volunteered to represent are not adequately protected by the Department of Justice.

C. The Public Interest Is Adequately Represented by the Department of Justice.

Each movant and applicant claims, in one way or another, that its interests and the interests of the consumers it seeks to represent will not be adequately represented by the Department of Justice as counsel for the United States.

Analysis of this claim requires reiteration, at the outset, of what the controlling interests and issues *are* and what they are not. In its first decision involving this matter, *California v. Federal Power Commission*, 369 U.S. 482 (1961), the Supreme Court held, as we have seen, that *antitrust* requirements take precedence over and govern regulatory determinations by the Federal Power Commission of what the public convenience and necessity requires. The Department of Justice represents the United States here in giving effect to those controlling antitrust considerations delineated by the Supreme Court in its application of Section 7 of the Clayton Act to this case. The complaint of the eighteen state commissions and distributing companies seeking to intervene is not that the attorneys for the United

States are inadequate to the antitrust task. The claim *is*, instead, that the United States Attorney and Department of Justice *will* give the precedence to antitrust requirements required by the Supreme Court and in the process neglect the conflicting conceptions of the would-be intervenors as to what the convenience and necessity of their consumers might otherwise dictate.[5]

We note in passing that the moving state commissions could not claim a right to intervene upon assertions of jurisdiction to regulate the activities of the New Company to be organized pursuant to El Paso's plan. The facilities the New Company will operate are interstate in nature, as were the facilities of Pacific Northwest, and the jurisdiction of the Federal Power Commission to regulate them is exclusive [15 USC § 717 (b); see *Panhandle Eastern Pipeline Co. v. P.S.C. of Indiana*, 332 U.S. 507 (1947), *F.P.C. v. Transcontinental Gas Corp.*, 365 U.S. 1 (1960), and authorities cited]. It is clear, in any event, that the regulatory process must take place in commission proceedings *after divestiture* upon rates and other matters with which this Court is not concerned. To intertwine antitrust and regulatory interests would defeat the orderly accomplishment of both.

The proof of this pudding is in the position assumed here by the Federal Power Commission. It participates *amicus curiae* upon a statement which says the Commission has no wish to become a party. In this the Commission recognizes that it is for this Court to fashion a divestiture decree in conformity with the antitrust requirements of the Supreme Court's mandate and for the Commission, when divestiture

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5. It is remarkable that one of the attorneys for California who protested the paramount importance of antitrust considerations before the Supreme Court in *California v. Federal Power Commission* now reverses his position and seeks to subvert antitrust considerations to other matters.

has been effected, to concern itself with regulatory matters unrelated to the Court's duties in respect of Section 7. If the twenty applicants and movants here were entitled to intervene upon the grounds they allege, then every consumer of natural gas in the western United States would be similarly entitled upon like grounds, and performance by this Court of its duties prescribed by the Supreme Court mandate would become practically impossible. See, for example, *New York City v. New York Telephone,* 261 U.S. 312 (1923), and *In Re Engelhard,* 231 U.S. 646 (1914), denying telephone subscribers' petitions to intervene in actions relating to rates in which state commissions were parties.

The right and duty of the United States Attorney and Department of Justice to represent the United States, and therefore the interests of all citizens, is statutory (28 USC § 507). The Supreme Court has accordingly held, in *United States v. Paramount Pictures,* 334 U.S. 131, 177 (1948):

> "The complaint of the [would-be] intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned the interests of those intervenors was adequately represented."

D. Applicants Have No Interest in El Paso's Property Entitling Them to Intervene.

None of the would-be intervenors has an interest in the assets to be divested which would authorize intervention under subdivision (3) of Rule 24 (a). This statement from Moore accurately summarizes the authorities:

> "What kind of an interest must a petitioner have in property subject to the control of a Court before he can claim an absolute right to intervene? *Obviously it must be an interest known and protected by the law:*

> A claim of ownership, or a lesser interest sufficient and of the type to be denominated a lien equitable or legal." (4 Moore's Federal Practice, para. 24.09, p. 45).

See also the analysis in *Archer v. United States*, 268 F2d 687 (10 Cir. 1959).

The movants and applicants here plainly have no *legal* interest in El Paso's property. Nor do contracts between the distributors and El Paso for purchase and sale of gas vest any such interest in the moving distributing companies. It is not claimed, nor could it be, that these agreements give the distributors a *legal* interest in El Paso's gas supplies in the nature of a lien or otherwise. They have no interest respecting rates charged for gas purchased under the agreements because *rates will not be affected by divestiture;* the New Company will continue the rates and other terms and conditions of service now in effect, and the Federal Power Commission will continue to regulate them.

In any event, *Sutphen Estates v. United States*, 342 U.S. 19 (1951), disposes of any claimed right to intervene in an antitrust case upon assertions of economic interest in property to be divested. As we have seen (supra p. 8), a lessor of property leased to a Warner Brothers subsidiary upon a lease guaranteed by Warner Brothers was denied intervention in an antitrust action in which Warner Brothers had been ordered divided into two companies.

On this point, as on the others discussed above, most of the would-be intervenors have simply repeated the language of Rule 24 in support of a claimed right to intervene, without analysis or citation of other authority (e.g., the "Statement" of California in support of its application, dated November 19, 1964). A few applicants (e.g., Cascade Natural Gas Company in its memorandum served November 18, 1964) grapple with Sutphen Estates and other authorities upon which we

rely in an effort to show that they are not inconsistent with intervention here. We submit this is unavailing and that there is no authority fairly supporting the motions and applications now before the Court.

Ford Motor Company v. Bisanz Bros., 249 F2d 22 (8 Cir. 1957), is heavily relied upon by the would-be intervenors who have undertaken to discuss authorities. It is not in point. The case holds only that Ford Motor Company could intervene in an action brought by property owners to terminate service by the defendant railroad to Ford's plant. Whatever difficulties there may be in reconciling this opinion of the Eighth Circuit with the Supreme Court authorities, it is clear that the Ford case did not involve the antitrust laws or other public interests entrusted to lawyers already in the case, that the issues Ford wished to raise as intervenor were of the same kind as had arisen between the parties, and that Ford's application was not presented to the Court for the first time after judgment.

Certain of the state commissions (*e.g.*, Washington commission memorandum p. 11) rely upon *Securities Commission v. U. S. Realty Co.*, 310 U.S. 434 (1940), as declaring a principle which would allow them to intervene as public agencies without the interest required by Rule 24. The decision does not so hold. It decides only that the S.E.C. may intervene in Chapter XI Bankruptcy proceedings under circumstances peculiar to bankruptcy and otherwise different from those involved here. The Supreme Court based the right of the S.E.C. to intervene in Chapter XI proceedings in part upon its statutory right to intervene in proceedings under Chapter X and the General Orders in Bankruptcy; unlike the commission applicants here, the S.E.C. sought to raise the same bankruptcy issues as might have been raised between the parties. Finally, the S.E.C.

sought to represent interests otherwise unrepresented in the bankruptcy case. In this case the Federal Power Commission participates as *amicus curiae* to be heard upon regulatory considerations deemed by it pertinent to the divestiture to be ordered by this Court. *The American Realty Co.* case has nothing to do with intervention by a state regulatory commission to raise matters upon which a federal regulatory commission is already participating *amicus curiae.*[6]

III.

PERMISSIVE INTERVENTION SHOULD BE DENIED

In several of the decisions analyzed above with respect to intervention as a matter of right under Rule 24 (a), a companion claim to permissive intervention under Rule 24 (b) also was denied.

No different conclusion is warranted here. Rule 24 (b) authorizes permissive intervention: (1) when a statute confers a conditional right to intervene or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. No statute confers any right, conditional or otherwise, to intervene here. No movant or applicant asserts any claim or defense on the merits at all because the merits have been finally decided. There is no question of fact or law the movants and applicants seek to raise in common with the antitrust matters which are the responsibility of the attorneys for the

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6. The related claim of the Oregon commission (Oregon commission memorandum p. 6) of a right to intervene as parens patriae of Oregon consumers is disposed of contrary to the commission's contentions by *Commonwealth Edison Co. v. Allis Chalmers Mfg. Co.*, 315 F2d 564 (7 Cir. 1963), *cert. den.* 375 U.S. 834, discussed supra p. 6.

United States. On the contrary, as we have seen, the purpose of the would-be intervenors is to inject into these proceedings issues of regulatory convenience and necessity over which antitrust considerations are paramount.

Rule 24 (b) also directs the Court, in determining whether to allow permissive intervention, to "consider whether the intervention will unduly delay or prejudice the adjudication" of issues between the parties. If the movants and applicants here were permitted to participate and try out the questions they seek to raise, the divestiture hearing probably would take longer to complete than the matters concluded in this litigation thus far. Intervention would make "divestiture without delay" a practical impossibility.

IV.

OTHER MATTERS RELATING TO CALIFORNIA, PACIFIC GAS AND ELECTRIC COMPANY AND PARADOX PRODUCTION CORPORATION

A. California.

A remarkable circumstance which occurred after the hearing on October 19 last raises serious confusion regarding the authority of those who seek to intervene on behalf of the consumers of California. A "Special Attorney for the People of the State of California" filed an application to intervene dated July 20, 1964, and addressed the Court extensively at the October 19 hearing (Tr. 75, *et seq.*). After that hearing the Public Utilities Commission of California filed a motion to intervene dated November 16, 1964, over the signature of its Chief Counsel. It, too, claims authority to represent California consumers.

There is more, however, than confusion as to who is counsel for California. The statement of its "Special Attorney" and the motion of the Chief Counsel of its Public

Utilities Commission are not consistent. The Special Attorney raises a series of questions regarding, and in fact appears to oppose, El Paso's divestiture plan. The California commission, on the other hand, appears to take no position on El Paso's plan, but seeks simply to represent the interests of California consumers upon whatever questions might arise.

B. Pacific Gas and Electric Company.

The Motion of Pacific Gas and Electric Company to intervene dated November 17, 1964, asserts the astonishing proposition that this Court lacks jurisdiction to prescribe details of the divestiture required by the mandate of the Supreme Court. P.G. and E. contends that this Court should abdicate to the Federal Power Commission on a host of matters which must be resolved to effect divestiture.[7] Although its motion cites in *California v. Federal Power Commission*, 369 U.S. 482 (1962), P.G. and E. appears to overlook the essential holding of the Supreme Court in that opinion, viz., that in this action preservation of the competition required by *the antitrust laws* is the paramount and governing consideration.

We submit that P.G. and E.'s motion, stripped to its bare essentials, proposes that P.G. and E. be made a party in order that it may contend that the Court lacks power to

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7. The Commission took no such position in its statement to the Court as *amicus curiae* on October 19 (Tr. 73, 74). The Washington commission, which is dissatisfied with El Paso's plan, also takes a different and correct position. In its memorandum served November 23, 1964, the Washington commission asserts (p. 4) that "it is within the jurisdiction of this court, not the Federal Power Commission, by its decree of divestiture to determine what shall be the capital structure, the balance sheet, the investment, the gas supply and other factors" relating to the New Company and essential to divestiture. The Oregon commission, in its memorandum served the same day, agrees (pp. 5, 9).

fashion the decree required by the mandate of the Supreme Court. This is itself a sufficient basis for denial.

C. *Paradox Production Corporation.*

As a would-be purchaser of the assets to be divested, this applicant has no interest in the action, El Paso's property or the divestiture decree. Our research has understandably failed to disclose any reported decision dealing with this type of claim to a right to intervene.

Recognizing that it has no interest within Rule 24 of any kind, Paradox, in its memorandum served on November 20, 1964, takes issue with El Paso's shareholders. This complaint, utterly unsupported by the authority Paradox cites,[8] is nothing more than a transparent effort to establish the curious proposition that the interests of the stockholders of Paradox are paramount to the antitrust requirements on which the mandate of the Supreme Court is based."

WILLIS W. RITTER

8. *United States v. duPont*, 366 U.S. 316 (1960), final decree on remand reported in 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962).

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

SEP 21 1965
JOHN F. DAVIS, CLERK

October Term, 1965

No. ~~596~~ 24

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

On Appeal From the United States District Court for the District of Utah, Central Division.

JURISDICTIONAL STATEMENT.

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IN THE

Supreme Court of the United States

October Term, 1965

No. .....

SOUTHERN CALIFORNIA EDISON COMPANY,

Appellant,

vs.

EL PASO NATURAL GAS COMPANY, *et al.*,

Appellees.

JURISDICTIONAL STATEMENT.

Appellant, Southern California Edison Company, appeals from a final order of the United States District Court for the District of Utah, Central Division, entered on June 29, 1965, denying it leave to intervene in the case of *United States of America v. El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation,* Civil Action No. C143-57 and seeks review by this Court of the decree of divestiture entered therein by the District Court on June 24, 1965. The following statement will show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Citation to Opinion Below.

On June 24, 1965, there was entered in the civil docket of the District Court for the District of Utah, Central Division, a decree of divestiture in the case of *United States of America v. El Paso Natural Gas Company, et al.*, and a minute order reciting the application of Southern California Edison Company (Edison) for leave to intervene filed on June 22, 1965, and the denial of such application by the Court. On June 29, 1965, there was entered in the civil docket of said Court a formal order of the Court (signed and dated June 28, 1965) denying the said application for leave to intervene filed herein on June 22, 1965. These orders have not been published in the official reports of the Federal Reporter. A true and correct copy of the formal order denying intervention and said decree of divestiture are attached hereto in their entirety and marked Appendix A. No memorandum opinion in support of said formal order denying intervention was entered by the Court to the best of appellant's information and belief. Appellant's notice of this appeal was filed with the District Court on July 23, 1965.

Jurisdiction.

The proceeding below was brought as a civil suit charging a violation of Section 7 of the Clayton Act,[1] by virtue of the acquisition by defendant El Paso Natural Gas Company (El Paso) of the stock and assets of Pacific Northwest Pipeline Corporation (Pacific Northwest). The Supreme Court of the United States on direct appeal, pursuant to the Expediting Act,[2] on April 6,

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[1] 15 U.S. Code, Section 18, 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950).

[2] 15 U.S. Code, Section 29, 32 Stat. 823 (1903), as amended, 36 Stat. 1167 (1911), 58 Stat. 272 (1944), 62 Stat. 989 (1948),

1964, reversed the dismissal of the complaint by the District Court after trial, and directed the District Court to order divestiture without delay.[3] Subsequent to said order, hearings were held in the District Court on El Paso's proposed plan of divestiture. On January 6, 1965, February 4, 1965, and February 19, 1965, the United States filed briefs and/or other memoranda with the District Court opposing in nearly every major aspect El Paso's proposed plan of divestiture, to wit: (1) El Paso's proposed spin off (the United States advocated a sale to third parties); (2) El Paso's proposed allocation of gas reserves; (3) unilateral contract changes made by El Paso; (4) El Paso's proposed disposition of Westcoast Transmission Company, Ltd., stock, and (5) El Paso's failure to propose any allocation to the new company of the benefits from the use of tax loss carryovers.[4]

The hearings before the District Court on El Paso's proposed plan of divestiture were concluded on February 4, 1965, the court having previously denied all applications to intervene theretofore filed by those seeking to question the propriety of such proposed plan. Thereafter, on May 24, 1965, a stipulation was entered into between the United States and El Paso, and filed with the District Court, providing for the entry of a decree of divestiture represented by El Paso before the Federal Power Commission[5] as being substantially identical to the plan of divestiture previously proposed by

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[3]*United States of America v. El Paso Natural Gas Company, et al.*, 376 U.S. 651, 12 L. ed. 2d 12, 84 S. Ct. 1044 (1964).

[4]Cf., Plaintiff's Brief Opposing Defendant El Paso's Divestiture Plan, dated December 4, 1964 and filed January 6, 1965, pages 2-3; also Plaintiff's Brief after Divestiture Hearings, filed February 19, 1965, pages 2-30.

[5]El Paso's Opening Brief, Vol. 1, page 46, FPC Docket No. CP63-204 et al.